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No. 86-993

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1986

RICHARD C. COX
PETITIONER

v.

CHARLES NORTON,
DIRECTOR OF TAX COLLECTION
OF THE LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT AND
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
RESPONDENTS

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This is a 42 U.S.C. §1983 action seeking to void an improvement assessment levied on Petitioner's real property based upon the failure of Respondent, Lexington-Fayette Urban County Government, to afford Petitioner a second hearing after the specific amount of his assessment became known. Petitioner had challenged the Urban County Government's initiation of a sanitary sewer project in the Kentucky state courts raising, among several other issues, the claim that the procedure followed under KRS 67A.871-.894, specifically, KRS 67A.875(6), violated the due process clause of the Fourteenth Amendment to the United States Constitution by failing to afford affected property owners a hearing on the exact amount of the improvement benefit assessment before the assessment was levied. The Kentucky Supreme Court ruled in favor of the Defendant Government specifically holding that the public hearing process provided for by the statutes protected the due process rights of the property owners. *Conrad v. Lexington-Fayette Urban County Government*, 659 S.W.2d 190 (Ky. 1983). After the United States Supreme Court dismissed the appeal filed in that action, *Conrad, supra, appeal dismissed mem., sub nom. Cox v. Lexington-Fayette Urban County Government*, 466 U.S. 919 (1984), Petitioner filed this action in U.S. District Court raising the identical issue, that is, that the imposition of the improvement benefit assessment without a public hearing held at such time as the exact amount of the assessment was known

violated due process. The court below affirmed the District Court's determination that the Kentucky law of res judicata required that the current action be dismissed inasmuch as there existed an identity of parties and causes of action between this action and the former action. The question presented is: whether the Court of Appeals correctly applied the doctrine of res judicata under Kentucky law so as to uphold the dismissal of Petitioner's §1983 action.

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COUNTERSTATEMENT OF THE CASE

Certain statements made in Petitioner's statement of the case must be corrected. First of all, it is not correct to characterize the assessment upon benefited properties in the sanitary sewer project as a "special tax assessment". KRS 67A.871-.894 provides for an improvement benefit assessment, rather than a tax, to be placed on benefited properties.

Secondly, it is incorrect to state that the Kentucky Supreme Court has not ruled on whether the assessment of Petitioner's property was done without due process since the public hearing that was reviewed by the Kentucky Supreme Court was held prior to the actual assessment. The court, in fact, specifically held that the public hearing process protected the due process rights of property owners. The Kentucky Supreme Court stated:

The public hearing provided for affected property owners, protected their due process rights, and was constitutional. The assessment is not an unlawful taking of property in violation of the United States Constitution and the Kentucky Constitution. There is no requirement that the public hearing must be a "trial-type" hearing.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and manner. *Matthews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). On March 31, 1980, a public hearing was held on this project at which several property owners spoke on the subject

and on the matter of the estimated assessments. No exact figures as to the cost of the benefits were presented because final bidding had not been made. All benefited property owners were given an opportunity to speak at the public hearing as required by statute. The scheduling of the public hearing prior to the determination of exact cost of the assessment does not invalidate the meeting. If a property owner is given an opportunity to be heard at sometime during the assessment proceedings before the liability of his property is fixed, due process is satisfied. *Shaw v. City of Mayfield*, 204 Ky. 618, 265 S.W. 13 (1924).

Conrad v. Lexington-Fayette Urban County Government, *supra* at 197. It is clear then that the issue raised here is the precise issue raised in the prior state court action, that is, whether the public hearing prior to the determination of the specific amount of the assessment complied with due process requirements or, to put it another way, whether the Government violated due process when it failed to afford Petitioner a *second* hearing after the specific amount of the assessment became known. As the Sixth Circuit opinion cogently explains, Petitioner's argument that a second hearing is required "misperceives the totality of the Kentucky regulatory scheme as it relates to this type of public works project where a bond issue is contemplated." *Cox v. Norton*, 797 F.2d 329, 331 (6th Cir. 1986).

Thirdly, the Court of Appeals did rely on Kentucky's *res judicata* doctrine in upholding the District Court's dismissal of this action. The District Court

specifically held that, since there existed an identity of parties and causes of action between this action and the former action, the matter is *res judicata* under Kentucky law citing *Newman v. Newman*, 451 S.W.2d 417 (Ky. 1970). The Sixth Circuit specifically upheld and agreed with that determination by the District Court. Since there is an identity of causes of action and parties, it is certainly true, as the Sixth Circuit held, that this action was "fairly encompassed and resolved by the prior litigation." *Cox v. Norton, supra* at 331.

SUMMARY OF ARGUMENT

The writ should be denied because the Sixth Circuit opinion in no way conflicts with decisions of this Court interpreting and applying 28 U.S.C. §1738 and since the Court of Appeals properly applies Kentucky law of *res judicata*.

ARGUMENT

Petitioner attempts to complicate and confuse what is in fact a clear and narrowly drawn issue. The Kentucky Supreme Court in a previous action in which Petitioner was a plaintiff has held that the public hearing procedure provided for by the Urban County Government pursuant to KRS 67A.871-.894 conformed with the requirements of due process even though the precise amount of the assessment had not been determined at the time of the public hearing. *Conrad, supra*. The Petitioner then filed an action in the U.S. District

Court under 42 U.S.C. §1983 contending that the actual levying of the assessment against his property was invalid inasmuch as no public hearing had been held prior to the determination of the exact amount of the assessment. The trial court held such action to be barred under the Kentucky law of res judication and the Sixth Circuit affirmed. *Cox v. Norton, supra*.

There is no dispute as to the governing principle to be applied in this case. The federal courts are required to give a state court judgment the same preclusive effect as that judgment would be given under the law of the state in which the judgment was rendered. 28 U.S.C. §1738; *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984); *Haring v. Prosise*, 462 U.S. 306 (1983); *Allen v. McCurry*, 449 U.S. 90 (1980). The Sixth Circuit is not in conflict with holdings of this Court as to the appropriate rule of law. Similarly, the Court of Appeals is correct in determining that the issue raised in this action is identical to that resolved by the previous action filed by Petitioner. Petitioner's argument that the prior court action has no res judicata effect since the specific amount of his assessment was not involved is defeated by the Kentucky court's explicit holding that the public hearing afforded due process to all affected property owners even though the specific amount of the assessment was not known.

The Sixth Circuit was required to give the prior state court judgment the same preclusive effect as that

judgment would have been given under Kentucky law. The Sixth Circuit did so and determined that the instant action involved the same issues and parties as involved in the prior action in the Kentucky court. By no stretch of the imagination is the ruling of the Sixth Circuit in conflict or inconsistent with applicable decisions of this Court. There is no basis under which this Court should exercise its discretion to grant certiorari in this case.

CONCLUSION

WHEREFORE, Respondent respectfully prays that the Petition of Certiorari to review the decision of the U.S. Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

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